

an entrepreneur's block should be limited to \$2,500 if the licensee is seeking to provide local service and \$5,000 if the licensee is seeking to build a wide-area network.³³

VI. *Spectrum Warehousing*

Congress recognized that spectrum is an extremely scarce resource and authorized auctions to allocate spectrum among various commercial users.³⁴ An entity purchasing spectrum in an auction obtains a valuable resource that could go underutilized if the entity does not provide service. The Commission believes that the best mechanism to control this is through stringent construction requirements.

A. Construction and Operation Requirements

The Office of Advocacy has supported stringent enforcement of system buildout in other competitive bidding proceedings. However, the structure of the SMR industry requires some modifications to the stringent buildout requirements.

³³ This predetermination is not likely to be onerous since a licensee's business plan would have to be developed prior to auction in an effort to obtain the necessary financing.

³⁴ In fact, spectrum is so scarce for new commercial uses that Congress authorized the transfer of a minimum of 200 MHz of spectrum designated for use by the federal government to commercial uses.

Currently, the Commission permits some SMR licensees extended implementation periods to construct and commence operation of their systems. 47 C.F.R. § 90.629. The Commission, in order to prevent warehousing, proposes to prohibit extended implementation on the non-contiguous channels but permit it for wide-area service in the upper 10 MHz of the band. FNPR at ¶ 44.

The Office of Advocacy disputes the notion that current SMR operators providing local service will warehouse spectrum if given extended implementation periods. In most instances, capital for small businesses, including SMR providers, is scarce. These licensees can ill-afford to expend limited amounts of capital on speculative ventures, such as gambling on the future value of spectrum. It is far more likely that small SMRs would purchase the spectrum to provide upgraded service or expand their coverage.³⁵

Rather than strictly prohibit the use of extended implementation plans for local service, the Commission should examine past construction time periods for SMR service based on the same number of channels utilized and the area covered. It should then use that time period as the normal span from license issuance

³⁵ In this respect, SMR is substantially different than broadband PCS. PCS as a service does not yet exist, except in limited experiments, and the market demand for broadband PCS is based on sheer estimation. Wealthy individuals or corporations willing to gamble could hoard spectrum until its true value is known and then resell it. SMR has been in existence for nearly two decades with more than 1.5 million customers. The value of the spectrum and its uses are well-known.

to operation that local-service providers should have to meet. That may be more than the 12 months the FCC is proposing. In addition, the Commission should provide an exemption process in which an SMR provider could show that a variety of financial or operational circumstances require a delay in operation.

The Commission's concern over warehousing by local SMR providers is misplaced. In fact, the Office of Advocacy opines that SMRs interested in providing wide-area coverage that emulate cellular or PCS would have a greater incentive to warehouse spectrum to see what the market in those competing services is like. These firms also are likely to have the financial resources needed to sit on their spectrum investment while examining the new wireless market.

The Commission's proposal to require annual certification of construction requirements for licensees seeking spectrum in MTAs, see *id.* at ¶ 47, is insufficient to prevent them from warehousing spectrum. These licensees also should be required, as with PCS licensees, to begin service to portions of the MTA on an interim basis. This additional mandate has two primary benefits: 1) it prevents a firm from tying up spectrum while it "leisurely" goes about constructing its system to see what the market conditions will be; and 2) it helps ensure that a scarce public resource is made available to potential customers as soon as possible and not

when the licensee believes the market is ready for system operation.

B. Spectrum Control

The FCC does not propose to limit the amount of spectrum that any single entity could control in the 800 MHz band as it has done in the PCS arena (where cellular companies face severe restrictions on the amount of spectrum that they can own in their service territories). *Id.* at ¶ 23. The Commission rests this conclusion on the theory that the amount of spectrum is well below the spectrum cap in PCS and the number of potential wireless service providers will prevent domination by any one firm. *Id.*

The Office of Advocacy does not dispute the FCC's finding that wide-area SMR providers will face a welter of competitors in the wireless voice market. What the Commission seems to be overlooking is the potential that any one entity controlling all 14 MHz of spectrum in the 800 MHz band can monopolize the provision of local SMR service. As the Office of Advocacy has noted, SMR service provides a valuable, low-cost mobile communication alternative for many small businesses. Allowing one firm to acquire all 14 MHz in a particular market might constrain or prevent current licensees from expanding capacity to handle more customers.³⁶ Any new

³⁶ That situation is currently occurring in the Pacific Northwest. Nextel's proposed acquisition of OneComm will give
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customers may be forced to deal with the holder of the 14 MHz and pay whatever monopoly rates that provider can squeeze from the market.³⁷ The Office of Advocacy does not believe that the FCC, by the simple stroke of a regulator's pen, should doom an entire customer segment to short or intermediate-run monopolists.

To prevent this looming specter of monopolization, the Commission should prohibit any one licensee from owning more than 10 MHz in any particular MTA. According to the FCC, 10 MHz should be sufficient to develop wide-area service. *Id.* at ¶ 16. Such a limitation would be absolutely essential if the Commission does not designate an entrepreneur's block. The absence of both spectrum acquisition limits and an entrepreneur's block might make it impossible for smaller SMRs to obtain any spectrum at all. The Office of Advocacy does not believe that the Commission could intend such a result or that the courts and Congress would countenance the outcome.

³⁶(...continued)

Nextel control over 96% of the licensed SMR frequencies in Washington, 87% in Oregon, and 73% in Idaho. In the Matter of Applications of Nextel Communications, Inc. for Transfer of Control of OneComm Corporation, DA 94-1087, Comments of Clarks Electronics, et. al. at 4-5 (Dec. 14, 1994). By any definition, that does not connote robust competition in the SMR market.

³⁷ The Office of Advocacy recognizes that the SMR licensees who obtain control over all 14 MHz cannot price their service beyond what alternative services currently charge. In today's market (and for the next 7 to 10 years when PCS is fully operational), that is the current cellular telephone licensees. Their prices usually are significantly higher than the rates charged by most current local SMR providers.

VII. Treatment of Incumbents

The Commission, from its experience with the 2 GHz band, fully understands the problems faced when spectrum use is reallocated. Current licensees must be protected against interference and other forms of infringement in order to protect the incumbent's investment. Any other result would be unfair to the incumbent who, in the middle of the game, realizes that the rules have drastically changed.³⁸

A. Mandatory Relocation

The most significant problem facing developers of wide-area SMR systems is the need for "clear" spectrum unencumbered with already extant SMR users. The Commission proposes holders of MTA licenses wishing to remove incumbents enter into voluntary negotiations. The Office of Advocacy does not object to the use of arm's-length transactions by MTA licenses to relocate SMR incumbents to other portions of the spectrum.

More troubling to the Office of Advocacy is the FCC's suggestion that the Commission might "intervene if incumbents refuse reasonable inducements to relocate." *Id.* at ¶ 35. The

³⁸ The Commission's proposal would be akin to requiring the Dallas Cowboys to defend their Super Bowl title (assuming they got that far) by playing football for one half and baseball for the second half after playing an entire season of football.

Office of Advocacy opines that the Commission's resources would be better spent in other areas than resolving disputes between private parties. Furthermore, the Office of Advocacy believes that one of the risks to be taken by MTA licensees is the possibility that they will not be able to acquire a complete block of clear spectrum.³⁹ Finally, the Commission, by stepping in to force a settlement and remove the incumbent, fails to take account of what happens to the incumbent's customers. There may not another SMR provider in the region. Until the MTA licensee's system is operational or the relocation has taken place customers of the incumbent operator may not have access to mobile communications. Therefore, the Office of Advocacy endorses the Commission's tentative conclusion to avoid resolving these disputes.

Nor does the Office of Advocacy believe that a potential solution to relocation can be found by adapting the procedures developed in the licensing of broadband PCS. The problem of serving customers in the interregnum during a move militates against the Commission adopting that approach. While the 2 GHz band was encumbered with numerous fixed point microwave facilities, the number of affected entities was relatively small (generally railroads and pipelines). In the case of a SMR licensee, the

³⁹ The MTA licensee is in no different position than a real estate company seeking parcels of land for future development. One property owner in the middle of the land the developer needs may decide not to sell. The government does not get involved in forcing the recalcitrant land owner to sell. That simply remains one of the risks of the business.

disruption to customers could be significant. Unless the Commission arrives at a method for providing service to customers during the relocation process, the PCS relocation procedure simply is inadequate.

B. Incumbent Expansion

One of the key needs for current licensees is flexibility to offer service to new customers and new services to current customers. To do this, SMR providers can increase the capacity of their current systems by obtaining more channels in their area or expand their service territory by acquiring channels in new areas. The Commission proposes to prohibit incumbents from expanding into the territory of MTA licensees while permitting MTA licensees to expand into the territory of incumbent local-area licensees. *Id.*

¶ 37. As compensation, the Commission proposes to allow incumbent SMR licensees to freely modify their systems as long as they perform no territorial expansion. *Id.*

The Commission's treatment of incumbent licensees calls to mind a sordid chapter in American history -- the treatment of Native Americans. The deal being proffered by the FCC is only slightly better than what Native Americans received. Yes, the Native Americans had free reign to organize their affairs on reservations so long as they stayed on reservations (which usually were not prime pieces of American territory). In a similar vein,

incumbent licensees have unlimited operational flexibility as long as they stay within their confined and often Balkanized territory. Meanwhile MTA licensees, like the pioneers, will be given free reign in their newly acquired territory with only the proviso that do not infringe on these in reserved areas. As with the pioneers, the Office of Advocacy suspects that this edict will have little impact on the movement of wide-area licensees. As George Santayana noted, those who forget the past are condemned to repeat it.⁴⁰

The Office of Advocacy believes that the Commission, in its effort to promote a sort of manifest destiny for certain types of wireless service providers, is willing to trample the rights of current license holders. The Office of Advocacy firmly believes that the FCC's priorities are backwards. All efforts should be made to assist current licensees who already provide a valuable service rather than laying hope on the success of future wide area SMR service. Therefore, the Office of Advocacy strongly urges the Commission to adopt its tentative conclusion to permit current licensees wide operational flexibility. The Office of Advocacy also strongly urges the FCC to permit incumbent licensees to expand into the territory of the MTA license holder.⁴¹ In that way,

⁴⁰ G. Santayana, *I Life of Reason* (1905); cf. Thucydides, *The History of the Peloponnesian War*, Book I, Sec. I (history of war composed so the past could be interpreted for the future).

⁴¹ The Commission seems concerned that such expansion would diminish the value of the MTA license. The Office of Advocacy can find nothing in the Federal Communications Act, as amended by OBRA, which requires the FCC to guarantee the value of a particular
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current licensees will be treated fairly and will have the opportunity to provide an important (and already extant) service to the public.

C. Co-Channel Interference Protection

The FCC requests comment on whether its current requirements for protection against interference would create problems in the construction of MTA license systems. *Id.* at ¶ 39. Even if it does create problems for the MTA licensee, so what! The Office of Advocacy opines that the Commission has done everything possible to accommodate the interests of MTA SMR licensees. The FCC should not cross the line and also allow MTA licensees to reduce the protection afforded to incumbent licensees. Irrespective of the problems it creates for current licensees, the failure to provide adequate protection against interference will be troublesome for customers of the incumbent licensee. The Office of Advocacy sees no reason why these individuals should be harmed in the Commission's grandiose scheme to provide certain SMR licensees with the opportunity to compete against cellular and PCS. Therefore, the Office of Advocacy strongly recommends that the Commission

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license. In any event, the Office of Advocacy does not believe that these MTA licenses will be as valuable as the Commission or supporters of MTA SMR service believe. Substantial competition from cellular and PCS will impose a significant damper on the ultimate value of these licenses.

continue to require MTA licensees to provide co-channel interference projection.⁴²

VIII. *Conclusion*

The Office of Advocacy termed the Commission's effort in the video dialtone proceeding a "Field of Dreams" strategy -- if they build it customers will use it. The FCC appears to be repeating that strategy with MTA licensing of SMR systems -- if they are built customers will come.

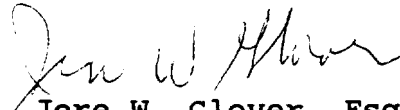
While that may be an ideal situation, the Commission seems to be overlooking the fact that its strategy has real impact on the vast majority of small businesses that currently provide local SMR service. Nor does the FCC evidence any understanding of the needs of customers of incumbent licensees or what is required to provide them with a low-cost and efficient mobile communications system.

The Office of Advocacy strongly urges the Commission to step back and closely examine the path that it has decided to take with respect to SMR licensing. Rather than emphasizing the ideal or the

⁴² If this reduces the ability of MTA licensees to construct their systems, then potential entrants will adjust their bids accordingly.

promise of the future, the Commission should give serious consideration to the alternatives discussed in these comments to ensure the proper functioning of the present.

Respectfully submitted,



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